SUPREME COURT, U. S.
FEB 12 1968
JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

NOTICE OF APPEAL FILED—AUGUST 17, 1967

PROBABLE JURISDICTION NOTED—JANUARY 15, 1968

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Docket Entries

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Complaint

Plaintiff, by its attorney, Marvin E. Pollock, complaining of the defendant, alleges:

1. At all the times herein mentioned, the plaintiff was and still is a body corporate existing under and by virtue of the Education Law of the State of New York, and vested by the said Education Law with the general management, operation, control and maintenance of all public schools within Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County (hereinafter referred to as "Central School District No. 1"), and is provided with and is authorized to expend public moneys for the sole purpose of administering the affairs of the public schools in Central School District No. 1 under the system of public education of the State of New York in accordance with the Constitution and laws of the State of New York.

2. Upon information and belief, at all the times herein mentioned, the defendant was and still is the Commissioner of Education of the State of New York.

3. Under the said Education Law the Commissioner of Education of the State of New York is required to apportion the amount annually appropriated by the Legislature of the State of New York for the public schools and any amounts so apportioned are required to be expended exclusively for school purposes authorized by the Constitution and laws of the State of New York.

4. The Constitution of the State of New York in Section 3 of Article XI, provides, in relevant part:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, * * * "

5. The First Amendment to the Constitution of the United States of America, made applicable to the State of New York by the Fourteenth Amendment, provides, in relevant part:

"Congress shall make no law respecting an establishment of religion * * * "

6. In accordance with sundry provisions of the said Education Law, among them Sections 701, 1709, and 1804, the plaintiff is authorized and empowered to purchase with public moneys such textbooks as may be necessary for the proper and efficient management of the public schools in Central School District No. 1, and to loan, rent or sell the same to pupils attending such schools.

7. Pursuant to such provisions of law, the plaintiff for some years past has purchased and now purchases textbooks with public moneys, and the same have been loaned, rented and sold to pupils attending the public schools in Central School District No. 1.

8. The plaintiff may not lawfully purchase textbooks with public moneys for free loan to pupils attending schools or institutions of learning wholly or in part under the con-

trol or direction of any religious denomination, or in which any denominational tenet or doctrine is taught (hereinafter referred to as "religious schools") or to such schools themselves, and to do so would be and is in violation of the Constitution and Education Law of the State of New York and the Constitution of the United States of America.

9. The defendant may not lawfully apportion to the plaintiff from public moneys appropriated by the Legislature of the State of New York for public schools any amounts used or to be used to purchase textbooks for free loan to pupils attending religious schools or to such schools themselves, and to do so would be and is in violation of the Constitution and Education Law of the State of New York and the Constitution of the United States of America.

10. Notwithstanding the foregoing provisions of the Constitution and Education Law of the State of New York and the Constitution of the United States of America, the Legislature of the State of New York, on or about June 1, 1965, purported to pass a certain "Act to amend the education law, in relation to the loan of textbooks to pupils in grades seven through twelve," the same being known as Chapter 320 of the Laws of 1965, to take effect September 1, 1966, and purporting to amend Section 701 of said Education Law. A copy of Section 701 as so amended is annexed hereto as Exhibit 1, the changes therein being indicated by brackets (for deletions) and italics (for additions).

11. Section 701 as so amended directs the boards of education in the several cities and school districts of the state, including the plaintiff, to purchase textbooks with public moneys and to loan the same free not only to pupils at-

tending public schools, as under present law, but also to pupils attending, among others, religious schools, without limit either as to the number of textbooks required to be so purchased and loaned or the amounts of public moneys to be expended therefor, and also directs the Commissioner of Education of the State of New York, in addition to the annual apportionment of public moneys pursuant to the said Education Law, to apportion to each school district, including Central School District No. 1, an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil.

12. Upon information and belief, failure on the part of the plaintiff to implement Section 701 as so amended, which is mandatory in nature, would subject its members to removal from office by the defendant under Sections 306 and 1706 of the said Education Law.

13. Despite its own serious doubts as to the constitutionality of Section 701 as so amended, in view of the mandatory nature of that Section and the removal power of the defendant referred to in paragraph 12 hereof, the plaintiff has been compelled to include in its proposed 1966-1967 budget an appropriation of funds to comply with Section 701 as so amended, which funds would otherwise not have been appropriated or would have been appropriated for lawful purposes.

14. The plaintiff must continue to take steps to implement Section 701 as so amended including the submission of the said budget to the voters of Central School District No. 1 on May 4, 1966, and will be compelled to purchase textbooks with public moneys for free loan to pupils resid-

ing in Central School District No. 1 who attend religious schools.

15. Upon information and belief, the defendant Allen, as Commissioner of Education of the State of New York, has taken and will continue to take steps to implement Section 701 as so amended and has apportioned or will apportion to the plaintiff public moneys appropriated or to be appropriated by the Legislature of the State of New York for the public schools for the purchase and free loan of textbooks to pupils residing in Central School District No. 1 who attend religious schools.

16. Chapter 320 of the Laws of 1965, in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools, is unconstitutional and void in that it authorizes and permits the use of public moneys in aid and maintenance of religious schools in violation of Section 3, Article XI of the Constitution of the State of New York and the First Amendment to the Constitution of the United States of America made applicable to the State of New York by the Fourteenth Amendment.

WHEREFORE, the plaintiff demands judgment as follows:

1. That Chapter 320 of the Laws of 1965 in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools be declared unconstitutional and void.

2. That the defendant, as Commissioner of Education of the State of New York, be restrained from removing or attempting to remove from office any member of the plaintiff Board of Education who either refuses or fails to com-

ply with Chapter 320 of the Laws of 1965 in so far as it requires the purchase of textbooks with public moneys for free loan to pupils residing in Central School District No. 1 who attend religious schools.

3. That the defendant, as Commissioner of Education of the State of New York, be restrained from apportioning to any school district any public moneys appropriated by the Legislature of the State of New York for public schools for the purchase of textbooks for free loan to pupils attending religious schools in the State of New York.

4. That the plaintiff have such other, further and different relief as the Court deems just and proper, together with costs.

(Verified April 28, 1966.)

EXHIBIT 1 ANNEXED TO COMPLAINT

§ 701. Power to designate text-books; purchase *and loan* of textbooks [and]; *purchase of* supplies [for sale or rental]. 1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate textbooks to be used in the schools under their charge.

2. In the several cities and school districts of the state, boards of education, trustees [or other school authorities may purchase text-books and supplies and either rent or sell the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.] *or such body of officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.*

3. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

4. The Commissioner of Education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of ten dollars per pupil for each pupil who resides within the school district and is loaned text-books pursuant to this section.

Defendant's Answer

Defendant, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for his answer to the complaint herein, alleges as follows:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, 4, 5 and 14 of the complaint herein.

2. Denies the allegations contained in paragraphs numbered 8, 9 and 16 of the complaint herein.

3. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs numbered 7 and 13 of the complaint.

4. As to the allegations of paragraph 6 of the complaint, defendant denies the allegations thereof except admits that plaintiff is authorized to purchase with public money, textbooks to be used by pupils in grades one through six in the public schools of the district and to provide such textbooks to the pupils therein (Education Law, § 703), and is further mandated to purchase and loan, upon individual request, textbooks to children enrolled in grades seven through twelve in either public or private schools in the district (Education Law, § 701).

5. As to the allegations of paragraph 10 of the complaint, defendant denies the allegations thereof, except he admits that the Legislature of the State of New York passed "An Act to amend the education law, in relation to the loan of textbooks to pupils in grades seven through twelve" and that such bill was signed by the Governor and became Chap-

ter 320 of the Laws of 1965, to take effect September 1, 1966, and that said Chapter amended Section 701 of the Education Law as set forth in Exhibit 1, attached to the complaint herein.

6. As to the allegations of paragraph 11 of the complaint, denies the allegations thereof, as to the provisions of Section 701, as amended, and for the provisions of said Section 701 reference is hereby made to the contents thereof.

7. As to the allegations of paragraph 12 of the complaint, defendant denies the allegations thereof and for the provisions of Education Law, § 306, reference is made to the provisions thereof.

8. As to the allegations of paragraph 15, defendant admits the same, except denies knowledge or information sufficient to form a belief as to any pupils residing in the plaintiff district who attend religious schools.

• • • • •

WHEREFORE, the defendant respectfully moves, in accordance with Rule 3211 of the Civil Practice Law and Rules, that the complaint be dismissed on the grounds set forth in paragraphs 9, 10, 11, and 12 above, and further requests that the complaint be dismissed on the ground that Education Law, § 701 is in all respects constitutional, or that summary judgment be granted to defendant holding that Education Law, § 701, as amended by Chapter 320 of the Laws of 1965, is constitutional and valid, and that defendant have such other, further and different relief as the Court deems just and proper.

(Verified May 16, 1966.)

Stipulation Amending Complaint and Answer

May 18, 1966

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that the complaint herein shall be deemed amended by the addition thereto of the following paragraph:

> "11A. There are pupils residing in Central School District No. 1 who are enrolled in grades seven through twelve in religious schools in the State of New York which comply with the compulsory education law."

IT IS HEREBY FURTHER STIPULATED AND AGREED that the defendant shall be deemed to have answered paragraph 11A of the complaint by denying knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

Affidavit of Intervenor-Defendants

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, each being duly sworn, depose and say:

1. Each of us is a citizen of the United States and of the State of New York, and resides within the geographical limits of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County.

2. Each of us is the owner of real property in said school district, assessed by the tax authorities in a sum exceeding $1,000 and each of us has within the past year paid taxes upon said assessment, including school taxes paid to said Central School District No. 1.

3. Each of us is the parent of a child or children who are in regular attendance at the following schools in the grades hereinafter indicated, and each of said children will be entitled to the loan of text books under Section 701 of the Education Law, which the plaintiff in this action claims to be unconstitutional. All of said children are attending said schools under the compulsory education laws, and each of said schools is a private school which complies with the compulsory education law. The names and addresses of your deponents as well as the names of their respective children, the school they legally attend and their respective grades therein, are as follows:

Name and Address of Parent	*Child*	*School*	*Grade*
Michael Rock 101 Mohawk Avenue Hampton Manor New York	Michael, III	St. Mary's School Hampton Manor New York	6th
Anthony Dwileski Ridge Road Prospect Heights New York	Michael	St. Mary's School Hampton Manor New York	8th
Peter Girzone 10 Mohawk Avenue Hampton Manor New York	Edmond	St. Mary's School Hampton Manor New York	7th
Doreen Beaudin 32 St. Clair Avenue Hampton Manor New York	John, Jr.	St. Mary's School Hampton Manor New York	7th
Charles Haigh 33 Electric Avenue East Greenbush New York	Mary Rose	Holy Spirit School East Greenbush New York	7th
	Margaret	St. John's Academy Rensselaer, New York	11th
	Elizabeth	St. John's Academy Rensselaer, New York	9th
Barbara Brennan Troy Road East Greenbush New York	Ann	Holy Spirit School East Greenbush New York	7th
	Mary Theresa	St. John's Academy Rensselaer, New York	9th

4. Each of us has purchased and expended funds for the purchase of all of the textbooks which our children have used in attendance at the said schools, including textbooks of the type which they will be entitled to receive on loan pursuant to Section 701 of the Education Law.

5. We make this affidavit in support of an application to intervene as defendants in this action for the purpose of supporting the constitutionality of the school textbook law which is being attacked by the plaintiff and of supporting the right of our children to receive the loan of textbooks under that law. We have read the affidavit of

James J. MacKrell, sworn to on May 18th, 1966 and endorse the statements contained therein.

MICHAEL J. ROCK,
ANTHONY DWILESKI,
PETER J. GIRZONE,
DOREEN BEAUDIN,
CHARLES L. HAIGH,
BARBARA BRENNAN.

(Sworn to May 18, 1966.)

Affidavit of James J. MacKrell

JAMES J. MACKRELL, being duly sworn, deposes and says:

1. I am an attorney-at-law of the State of New York, residing at Elliott Road, in the Town of East Greenbush, Rensselaer County, New York, and having been retained by Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh, and Barbara Brennan, hereinafter described as "the proposed intervenors", to represent their interests and to protect their rights and the rights of their children in this action.

2. The plaintiff in this action is the Board of Education of Central School District No. 1, Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County, and Chatham, Columbia County, hereinafter called "the District". The defendant is the Commissioner of Education of the State of New York. The complaint (copy of which is annexed to this affidavit as Exhibit A) was served upon the defendant on or about April 29, 1966. I am advised that the defendant has not yet answered or made any motion addressed to the complaint.

3. The purpose of this action, according to the complaint, is to enjoin the defendant Commissioner from complying with or enforcing the provisions of Section 701 of the Education Law, as amended, insofar as it permits and requires the loan of textbooks to children attending schools which comply with the compulsory education law and which are operated under religious auspices throughout the State, to declare that Section unconstitutional, and to enjoin the defendant Commissioner from removing the members of the plaintiff Board from office if they fail or refuse to comply with that Section.

4. The District has a total population of approximately 35,000. Within the District there are 6 public grade schools and 2 public high schools, with a total enrollment of approximately 4,418 pupils, of whom approximately 1,903 are enrolled in grades seven to twelve.

5. There are also within the District two Catholic parochial schools, namely, St. Mary's School in Clinton Heights in the Township of East Greenbush and the Holy Spirit School located in the Township of East Greenbush. Each of these schools duly complies with the compulsory education law and each gives instruction in grades kindergarten through eight, except as hereinafter indicated. St. Mary's School in Clinton Heights has an enrollment of approximately 329, of whom approximately 52 are enrolled in the seventh and eighth grades; Holy Spirit School has an enrollment of approximately 305, of whom approximately 27 are enrolled in the seventh grade this year. An eighth grade will be added to Holy Spirit School next year.

6. There is no high school located within the District other than public. Parents in the District, who wish to send their children to high schools other than public, send them, for the most part, to high schools located in nearby cities.

7. The six proposed intervenors whom I represent are citizens of the United States and of the State of New York and residents of the District. All six of them are owners of real property in the District and have paid taxes currently thereon, including school taxes paid to the District. All six of them are parents of children who are residing in the District and who are attending Catholic parochial schools in the District pursuant to the compulsory education laws and who will be entitled under Section 701 of the Education Law to receive the loan of textbooks in

connection with their studies at those schools. Also two of them are parents of children who are residing within the District and who are attending Catholic high schools outside the District pursuant to the compulsory education laws and who will be likewise entitled under Section 701 of the Education Law to receive from the District the loan of textbooks in connection with their studies at those schools.

8. The interest of the proposed intervenors in supporting the constitutionality of the law here under attack and in securing the benefits of that law for their children, is direct and vital. That interest is not now directly represented, and may not be adequately represented by the defendant Commissioner, since the Commissioner himself is not a direct recipient of benefits conferred by the statute now challenged and is not a member of the class for whose benefit the statute was enacted. All of the proposed intervenors, and their children, on the other hand, are members of the class which the Legislature intended to aid, and for whose benefit the law was enacted. All of them are affected by this action and each and all of them may be bound by the judgment herein. In addition, their claim and their defense, based on the constitutionality of the law here under attack, present common questions of law and fact with the claims and defense of the parties in this action, as to the constitutionality of the law here under attack as it affects these intervenors and their children, and the proposed intervenors and their children are persons directly interested in this action.

9. The law, which plaintiff attacks, provides in substance that school districts throughout the State shall loan textbooks, covering secular subjects only, to children enrolled in grades seven to twelve of both public schools and private

schools which comply with the compulsory education law. It is plaintiff's claim, as set forth in the complaint, that this law is unconstitutional insofar only as it applies to children attending private schools (such as those attended by the children of the intervenors) which comply with the compulsory education laws and which are conducted under religious auspices. It is the position of the proposed answer (annexed as Exhibit B to this affidavit) that to deny the loan of such textbooks to children attending duly qualified private schools because those schools are conducted under religious auspices, while providing such loans to other children attending other schools, would be, as to the intervenors and their children and others similarly situated, an interference with their freedom of religion, a denial of equal protection of the laws, and a denial of due process, contrary to both the Constitution of the United States and the Constitution of the State of New York.

10. If the proposed intervention is granted, it will not delay the determination of the action or prejudice the substantial rights of any party.

11. I make this affidavit in support of an application for an order to show cause why the proposed intervention should not be granted, because it is imperative that the proposed intervenors be brought in as parties defendant at the earliest possible moment to insure the proper protection of their rights and the rights of their children, and to prevent delay to the parties.

12. No previous application for the relief herein sought has been made to any court or judge.

JAMES J. MACKELL

(Sworn to May 17, 1966.)

Order of Intervention

May 27, 1966

The motion of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan for leave to intervene as parties defendant in this proceeding having come on to be heard, pursuant to order to show cause dated May 19, 1966, now, on reading and filing said order to show cause, the joint and several affidavits of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan, sworn to May 18, 1966 and the affidavit of James J. MacKrell sworn to May 17, 1966, in support of said motion, with proof of due service thereof, and upon the proposed answer of the proposed intervenor-defendants herein, and attached as Exhibit B to the aforesaid affidavit of James J. MacKrell, and after hearing James J. MacKrell, Esq. of counsel for the proposed intervenor-defendants in support of said motion and it appearing that the attorneys for the plaintiff and defendant do not oppose said motion for leave to intervene, and due deliberation having been had and the Court being of the opinion that the proposed intervention will not unduly delay the determination of the action or prejudice the substantial rights of any party,

Now, on motion of James J. MacKrell, Esq., attorney for the proposed intervenor-defendants, it is

ORDERED:

1. That the application of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan be and the same hereby is granted and that said proposed intervenors and each of them are hereby added as intervenor-defendants to the above entitled action.

2. That the caption of this action be and the same hereby is amended to add the above named intervenors as intervenor-defendants in said action, and that said intervenor-defendants shall be entitled to be heard in all subsequent proceedings herein.

3. That said proposed intervenors be and hereby are granted leave to serve and file within five days from the date of this order a verified answer substantially in the same form as the proposed answer annexed as Exhibit B to the moving affidavit of James J. MacKrell.

Enter,

ISADORE BOOKSTEIN,
J.S.C.

Answer of Intervenor-Defendants

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE; DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, by their attorney, James J. MacKrell, for their answer to the complaint herein:

1. Admit the allegations contained in paragraphs numbered "2", "4" and "7" of plaintiff's complaint.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered "12" of plaintiff's complaint.

3. Deny each and every allegation contained in paragraphs numbered "8", "9" and "16" of plaintiff's complaint.

4. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "1", except that they admit that at all the times mentioned in the complaint the plaintiff was and still is a body corporate existing under and by virtue of the Education Law of the State of New York and vested by the said Education Law with the powers and duties therein specified.

5. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "3", except that they admit that the Commissioner of Education of the State of New York is vested with the powers and duties specified in said Education Law.

6. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "5", except that they admit

that the First Amendment to the Constitution of the United States of America, made applicable to the State of New York by the Fourteenth Amendment, provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ."

7. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "6", except that they admit that the plaintiff is authorized, empowered and required to purchase and distribute textbooks as provided by the Education Law of the State of New York.

8. Deny each and every allegation of paragraph of the plaintiff's complaint numbered "10", except that they admit that the Legislature of the State of New York duly passed and the Governor, on June 1, 1965, signed Chapter 320 of the Laws of 1965 to take effect September 1, 1966 and amending Section 701 of the Education Law.

9. Deny each and every allegation of paragraph of plaintiff's complaint numbered "11", except that they admit that Section 701 of the Education Law of New York, as amended, directs the boards of education in the several cities and school districts of the State, including the plaintiff, to purchase textbooks with public money and loan them to pupils enrolled in grades 7 to 12 of public and private schools which comply with the compulsory education law, all as provided in said Section 701, as amended.

10. Deny each and every allegation of paragraph of plaintiff's complaint numbered "13", except that they admit that the plaintiff has included in its proposed 1966-

1967 budget an appropriation of funds to comply with Section 701 of the Education Law as amended.

11. Deny each and every allegation of paragraph of plaintiff's complaint number "14", except that they admit that the plaintiff is and will be required to comply with Section 701 of the Education Law, as amended.

12. Deny each and every allegation of paragraph of plaintiff's complaint numbered "15", except that they admit that the defendant Commissioner of Education has complied and so far as these intervenors are presently advised will continue to comply with the requirements of Section 701 of the Education Law as amended.

For a first, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

13. The children of the intervenor-defendants and other children similarly situated are attending, in compliance with the compulsory education laws of the State of New York, private schools which comply with said compulsory education laws and said children have the right, guaranteed by the Constitutions of the United States and of the State of New York, so to attend. Said children have a right under the laws of New York to receive the loan of textbooks designated for use in public elementary or secondary schools of the State pursuant to Section 701 of the Education Law as amended.

14. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which

comply with said laws while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with the free exercise and enjoyment of religion by the intervenor-defendants and their children and others similarly situated and would be contrary to the First and Fourteenth Amendments to the Constitution of the United States and contrary to Article 1, Section 3, of the Constitution of the State of New York.

For a second, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

15. Repeat each and every allegation contained in paragraph numbered "13" of this answer, and incorporate the same herein as though fully set forth.

16. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which comply with the said laws, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be a denial to the intervenor-defendants and their children and others similarly situated of the equal protection of the laws and a discrimination against them because of their creed and religion, and would be contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article 1, Section 11, of the Constitution of the State of New York.

For a third, affirmative and complete defense to the complaint of the Plaintiff herein, the Intervenor-Defendants allege and respectfully show this Court:

17. Repeat each and every allegation contained in paragraph numbered "13" of this answer, and incorporate the same herein as though fully set forth.

18. To forbid the loan of such textbooks to the children of the intervenor-defendants and others similarly situated, in lawful attendance under the compulsory education laws at private schools conducted under religious auspices which comply with the said laws, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be a deprivation and denial to the intervenor-defendants and their children and others similarly situated of their liberty and property without due process of law and would be contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and contrary to Article 1, Section 6, of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment that Section 701 of the Education Law, as amended, be declared valid and constitutional and that the complaint be dismissed.

JAMES J. MACKRELL,
Attorney for Intervenors,
Office and P. O. Address:
849 New Loudon Road,
Latham, New York.

(Verified May 18, 1966.)

Order Adding Party Plaintiff

SUPREME COURT

ALBANY COUNTY

August 2, 1966

At the conclusion of arguments on the motions herein heard before Hon. T. Paul Kane, at a Special Term, Part I of this Court, on July 8, 1966, the attorney for the plaintiff having informed the Court that the Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York ("Roslyn School Board") had voted to join in this action as a co-plaintiff and had requested the attorney for the plaintiff to take the necessary steps to accomplish that result, and the attorney for the plaintiff having made an oral motion for an order joining the Roslyn School Board as a plaintiff herein, and the attorneys for the defendant and intervenor-defendants having consented in open court to the entry of such an order, and the attorneys for all the parties having consented at the foot of this order to the entry hereof without further notice, it is hereby

ORDERED, that the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York ("Roslyn School Board") be and it hereby is joined as a party plaintiff in this action, and it is further

ORDERED that the complaint herein as amended be deemed to allege a cause of action by the Roslyn School Board against the defendant in all respects the same as the cause of action alleged therein by the plaintiff, except that wher-

ever reference is made to Central School District No. 1, it shall be deemed to refer to the Roslyn School Board, and it is further

ORDERED that the answers herein be deemed to stand as answers to the cause of action alleged by the Roslyn School Board, and it is further

ORDERED that the Roslyn School Board be deemed to have joined in the motion by the plaintiff for judgment on the pleadings, and it is further

ORDERED that the motions by the defendant and intervenor-defendants for judgment dismissing the complaint or in the alternative for judgment declaring Chapter 320 of the Laws of 1965 constitutional shall be deemed to apply to the cause of action alleged by the Roslyn School Board.

Enter

T. PAUL KANE,
J.S.C.

Decision of Supreme Court, Albany County

August 18, 1966

T. Paul Kane, J.:

Section 701, Subdivision 3 of the Education Law of the State of New York was amended by Chapter 320 of the Laws of 1965 to become effective September 1, 1966. It provides as follows:

> "3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

The significant portion of this amendment is, of course, the requirement that school districts must purchase textbooks for pupils enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. Plaintiffs are the Board of Education of Central School District No. 1, Towns of East Green-

bush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham, Columbia County, and also the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York, pursuant to a stipulation of the parties and an order of this court. Said plaintiffs, hereinafter known as "Greenbush Board" and "Roslyn Board" respectively, bring an action against James E. Allen, Jr. as Commissioner of Education of the State of New York, and seek a judgment declaring the above mentioned portion of Chapter 320 of the Laws of 1965 unconstitutional and void and to restrain the defendant from appropriating any money for the purposes of said section or any other action in regard thereto. Heretofore parents of certain pupils, residents of plaintiff's Greenbush Board District, who attend private schools and who are entitled to the benefits proposed by the statutory provision under attack, have been granted leave to intervene by order of the court. They shall hereinafter be identified as "intervenor-defendants".

The defendant Commissioner has moved to dismiss the complaint, or in the alternative for judgment declaring the statute in question in all respects constitutional and valid. Intervenor-defendants make a similar motion and the plaintiffs cross-move for summary judgment for the relief demanded in the complaint. There is thus before the court the determination of the constitutionality of a state statute. The answer of the defendant Commissioner contains five separate affirmative defenses, the third of which questions the plaintiffs' standing to bring such an action against the State or an officer thereof, and also the plaintiffs' capacity to question the constitutionality of a State statute. Obviously a disposition of this defense must be made before there can be any consideration of the merits of the action.

To this court the matter of status or standing is not clear cut. Granted there is apparent substantial authority prohibiting a municipality or agency of the state from challenging a state statute (Black River Regulating District v. Adirondack League Club, 307 N. Y. 475), but the rule could be subject to some conditions and limitations, which appear particularly appropriate in the pending matter. A school district and its Board of Education is more than a mere agent of the State. It is an entity performing a state purpose pursuant to the mandate of the people as directed by their constitution. (New York State Constitution Article 11, Section 1; Education Law, Section 2(14); Matter of Divisich v. Marshall, 281 N. Y. 170). The fulfillment of its purpose requires considerations that exceed the powers of a regulating district as prescribed in the Black River case, supra. This distinction is recognized by the statutory definition of defendant's powers which refer to the Commissioner's advice and guidance to the school officers of all districts of the state "in relation to their duties and the general management of the schools under their control". Education Law, Section 305 (2). Among these duties is a requirement to comply with the provisions of the Education Law. If, however, the Board of Education, as evidenced by this action, concluded that they were being compelled to perform an unlawful act, what is their remedy? Certainly they should have the right to properly litigate any question affecting the performance of their duties. "A grant to school organizations of the power to maintain actions implies a legislative intent that such organizations should prosecute any action they might deem necessary for the protection; and preservation of school funds and property." 79 C. J. S. Schools and School Districts, Section 429.

The members of a Board of Education should not, as an alternative, be subjected to a removal statute. (Education Law, Section 306). Furthermore, they should not be required to perform and be met with a taxpayer's action. As an additional impediment to access to the courts, there is considerable authority for the position that such an action would not lie under General Municipal Law, Section 51, since it has been held that a school district is not a municipal corporation. (General Municipal Law, Section 2; Brooks v. Wyman, 220 A. D. 204, affd. 246 N. Y. 534; Johnston v. Gordon, 247 A. D. 40.) An action brought by a resident of the district as a taxpayer, would be met with the identical barrier offered as defendant's third affirmative defense. (St. Clair v. Yonkers Raceway, 13 N. Y. 2d 72; Bull v. Stichman, 273 A. D. 311, affd. 298 N. Y. 516.) While there may be historical and practical considerations for the rule as established, there are graver and more disturbing problems created by a broad application thereof. Specifically, can these plaintiffs in effect be foreclosed from access to the courts? To pursue the matter further, an extension of this rule will eventually not only restrict the court in, but effectively prohibit it from the performance of its function in the balance of power structure as a third arm of our government. This power in the court to strike down a statute as unconstitutional belongs to the people, and while it requires the imposition of limitations and restraints, certain flexibility should also exist in order to avoid an unjust result. In other words, this power in the courts is so basic that a denial of it to the people could, *per se*, be a violation of a constitutional right. (U. S. Constitution, Amendment XIV, Section 1; City of Buffalo v. State Board of Equalization and Assessment, 26 A. D. 2d 213, citing Matter of Bond & Mortgage Guarantee Co., 249

A. D. 25, affd. 274 N. Y. 593). Therein a county clerk questioned the constitutionality of a state statute that required him to exempt certain corporations from the payment of fees. The court rejected his argument holding that compliance with the statute did not affect his rights as a county clerk. "The constitutional guaranty does not extend to the mere interest of an official, as such, *who has not been deprived of his property without due process of law or denied the equal protection of the laws.* (Columbus & Greenville R. Co. v. Miller, 283 U. S. 96)," 249 A. D. 25, 27 (emphasis supplied). This rule would also apply to plaintiffs, since a denial of access to the courts may well contravene their constitutional rights. Furthermore, under such circumstances consideration should be given to the position of the resident district taxpayer, not a party to this proceeding, if his constitutional rights may be impaired. (United States v. Raines, 362 U. S. 17, 23.)

As a result, the court, for the reasons stated, finds that these plaintiffs do possess the necessary standing to maintain the within action. The third and fourth affirmative defenses set forth by defendant cannot be sustained, the first affirmative defense has been rendered moot by an amendment to the complaint, the second and fifth affirmative defenses are without foundation.

Thus the court reaches the merits of the controversy upon these motions. The Constitution of the State of New York, Article 11, Section 3, provides as follows:

> "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direc-

tion of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (Formerly § 4 of Art. 9, renumbered and amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.)

It would seem that the statute under attack contravenes this provision of the Constitution, Article 11, Section 3, supra. It was so held by the courts of this state some years ago when a similar statute was rendered unconstitutional in Smith v. Donahue, 202 A. D. 656. In that case the implementation of the statute involved the purchase of textbooks and school supplies for parochial schools directly rather than loan upon request by the student of such schools. Therein, as in the case before this court, the question of the "pupil benefit theory" was argued, requiring a determination herein as to whether the Smith case can be considered precedent. It should be noted, when discussing a provision for supplies running directly to the school, the court said at page 664:

"These supplies are to be furnished in the same manner and to the same party as textbooks. It seems to us to be giving a strained and unusual meaning to words if it holds that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and mean-

ing of the Constitution and in consequence equally unconstitutional."

Earlier the court set forth its definition of a school district and its component parts at page 663:

> "A school district is a district of and for the public schools; it was organized here as such and exists as such. The school is not the building and its equipment; it is the organization, the union of all the elements in the organization to furnish education in some branch of learning—the arts or sciences or literature. It is the institution, and the teachers and scholars together, that make it up. The pupils are part of the school."

It would seem, at least, the court had in mind a rejection of what is referred to as the "pupil benefit theory". Of course this theory was later advanced in Judd v. Board of Education, 278 N. Y. 200 and specifically rejected by the Court of Appeals. The substance of this decision was the unconstitutionality of the public transportation of students to parochial schools, which shortly thereafter was provided for by constitutional amendment. (Constitution of the State of New York, Article 11, Section 3.) There is no indication nor can this court find any authority for the proposition that this constitutional amendment ratified the child benefit theory after its rejection in the Judd case. Zorach v. Clauson, 303 N. Y. 161, cited by defendant and intervenor-defendants, does not sustain their position. Therein an unsuccessful attack was made upon the "release time" program (Education Law, Section 3210 (1)). However, the thrust of the argument was directed at New York Constitution, Article 1, Section 3, rather than Article 11, Section 3. It should be noted, however, that the court,

in referring to the matter of released time observed at page 169: "In the instant case, there is no 'use' of tax-supported 'property or credit or any public money' 'directly or indirectly' 'in aid or maintenance' of religious instruction (People *ex rel.* Lewis v. Graves, 245 N. Y. 195, 198 * * *)." It would seem, at least by implication, that what was not found objectionable in Zorach v. Clauson, supra, may be present in the matter at hand. A history of this issue in the State of New York compels one conclusion: we are squarely facing a constitutional prohibition. The court is little troubled in perceiving this prohibition in Article 11, Section 3 of our State Constitution, with due consideration for and acknowledgment of the strict rules applicable to those who question the constitutionality of a state statute including but not limited to the rule the unconstitutionality must be demonstrated beyond a reasonable doubt. Wiggins v. Town of Somers, 4 N. Y. 2d 215.

However, the court is somewhat hazy in perceiving the atmosphere created by recent decisions in the Supreme Court of the United States under the First Amendment made applicable to the States by the Fourteenth Amendment (Cantwell v. Connecticut, 310 U. S. 296), and their effect upon the efficacy of this State statute under attack. It is even difficult to find a point of departure. However, it would seem that the more recent decisions, properly define the mode of thinking regarding the applicable portions of the First Amendment (Engel v. Vitale, 370 U. S. 421; Abington School Dist. v. Schempp, 374 U. S. 203). The specific words of Amendment I are "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." A reading of the above mentioned cases makes it difficult to conclude that the statute in question is not in violation of both the

establishment clause and the free exercise clause. This becomes even more obvious if the effect of the implementation of this statute is projected to the point where parents of students at private schools begin to rely upon the assistance of public moneys for textbooks, and private schools anticipate this reliance in the preparation of their budgets. If the textbooks provided at some subsequent time become unacceptable or even arguable as offensive to private schools, is there some form of financial compulsion present that would affect a purportedly voluntary decision by either a parent or a representative of a private school? Mathematic texts, mentioned in oral arguments of counsel, perhaps present no problem, but what of history, science or social studies in general that are or will be part of a public school curriculum. Might this program prelude potential interference in a private school program, or might it precipitate the commingling of private and public school programs to the extent that each would ultimately compromise basic principles for financial or academic expediency. Broader implications of these thoughts are found in the concurring opinion of Mr. Justice Brennen in Abington School Dist. v. Schempp (supra, at page 242):

> "The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values if its own. In my judgment the First Amendment forbids the State to inhibit that freedom

of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one —very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent."

These implications are further advanced in the concurring opinion of Mr. Justice Douglas in the same case at page 229:

"But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under the same clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

> The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.
>
> Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended, as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that 'no law respecting an establishment of religion' shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."

The court is aware of the implications contained in these views as they may affect many federal and state programs in aid of students attending private educational institutions under religious auspices. However, it is this court's duty, as it sees it, to determine the specific question before it based upon what it believes to be the law.

Accordingly, for the reasons stated, the motions of the defendant and intervenor-defendants are denied and the cross-motion of the plaintiffs for summary judgment is in all respects granted, each without costs.

Submit order on five days notice. All papers to attorneys for plaintiffs.

Order and Judgment of Supreme Court, Albany County

August 29, 1966

The defendant having moved for an order dismissing the complaint herein, as amended, on the ground that it fails to state a cause of action, or in the alternative for judgment declaring Chapter 320 of New York Laws of 1965 to be in all respects constitutional and valid, and the intervenor-defendants having made a similar motion, and the plaintiffs having cross-moved for judgment declaring Chapter 320 of New York Laws of 1965 unconstitutional and void insofar as it provides for the purchase of textbooks with public moneys for free loan to children enrolled in grades seven to twelve of schools or institutions of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, complying with the compulsory education law (said children hereinafter referred to as "pupils attending religious schools"), for certain ancillary relief, and for such other, further and different relief as the Court may deem just and proper, and the motions having duly come on to be heard before this Court on July 8, 1966, and after hearing Hon. Louis J. Lefkowitz, Attorney General of the State of New York, the attorney for the defendant, by Jean M. Coon, Assistant Attorney General, of counsel, in support of the defendant's motion, James J. MacKrell, Esq., attorney for the intervenor-defendants, by Porter R. Chandler, Esq., of counsel, in support of intervenor-defendants' motion, and Marvin E. Pollock, Esq., attorney for the plaintiffs, in support of plaintiffs' cross-motion;

Now, on reading and filing the defendant's notice of motion, dated May 16, 1966, the intervenor-defendants'

notice of motion, dated June 14, 1966, the plaintiffs' notice of cross-motion, dated May 19, 1966, the complaint herein, verified April 28, 1966, the stipulation amending the complaint herein, dated May 18, 1966, the defendant's answer herein, verified May 16, 1966, the intervenor-defendants' answer herein, verified May 18, 1966, the order to show cause made by Hon. Isadore Bookstein, dated May 19, 1966, the affidavits of James J. MacKrell, Esq., sworn to May 17, 1966, and of Michael Rock, Anthony Dwileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan, sworn to May 18, 1966, in support of said order to show cause, the order on intervention, made by Hon. Isadore Bookstein, dated May 27, 1966, the order joining as a party plaintiff herein the Board of Education of Union Free District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York, made by Hon. T. Paul Kane, dated August 2, 1966, and upon all the pleadings and proceedings herein, and due deliberation having been had, and on filing the opinion of the Court dated August 18, 1966 denying the motions of the defendant and intervenor-defendants and granting the plaintiffs' cross-motion, it is

ORDERED that the said motion of the defendant is hereby denied in all respects without costs; and it is further

ORDERED that the said motion of the intervenor-defendants is hereby denied in all respects without costs; and it is further.

ORDERED that the said cross-motion of the plaintiffs is hereby granted in all respects without costs; and it is further

ORDERED, ADJUDGED AND DECREED that Chapter 320 of the New York Laws of 1965, as amended by Chapter 795 of

the New York Laws of 1966, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools is hereby declared unconstitutional and void and in violation of Article XI, Section 3 of the Constitution of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED that Chapter 320 of the New York Laws of 1965, as amended by Chapter 795 of the New York Laws of 1966, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools is hereby declared unconstitutional and void and in violation of both the establishment and free exercise clauses of the First Amendment to the Constitution of the United States of America; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant is hereby enjoined from apportioning to any school district in the State of New York any public moneys appropriated by the Legislature of the State of New York for public schools for the purchase of textbooks for free loan to pupils attending religious schools, and from taking any other action to implement or effectuate the provisions of said law, as amended, hereby declared to be unconstitutional and void; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant is hereby enjoined from removing or attempting to remove from office any member of either of the plaintiffs who either refuses or fails to comply with the provisions of said law, as amended, hereby declared to be unconstitutional and void.

Enter,

T. PAUL KANE,
J.S.C.

Decision of Appellate Division

December 30, 1966

Judgment and order reversed, on the law, and complaint dismissed, without costs.

Opinion per Herlihy, J., in which Gibson, P. J., and Reynolds, J., concur.

Staley, Jr., and Brink, JJ., concur in the result, in an Opinion per Staley, Jr., J.

Order of Reversal of Appellate Division

January 6, 1967

The Defendant-Appellant and the Intervenor-Defendants-Appellants having appealed from an order and judgment of the Supreme Court, entered on the 30th day of August, 1966, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above stated term of this Court, and having been argued by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, counsel for Defendant-Appellant, and by Porter R. Chandler, Esq., of counsel for James J. MacKrell, Esq., counsel for Intervenor-Defendants-Appellants, and by Marvin E. Pollock, Esq., of counsel for the Plaintiffs-Respondents, and, after due deliberation, the Court having rendered a decision on the 30th day of December, 1966, it is hereby

ORDERED, that the judgment and order appealed from be, and the same hereby is, reversed, on the law, and the complaint dismissed, without costs.

Enter:

JOHN J. O'BRIEN,
Clerk.

Opinions of Appellate Division

Majority Opinion

Herlihy, J.

This is an appeal from an order and judgment which declared Chapter 320 of the Laws of 1965 in violation of the Constitutions of the State of New York and of the United States.

Section 701 of the Education Law provides for the purchase of textbooks with public monies for loan to students enrolled in grades 7 through 12 in public or private schools. The constitutional question involves the issue of using such funds for the purchase of books to be loaned to students in schools under the control or direction of a religious denomination.

The plaintiffs seek a declaratory judgment that the said law is unconstitutional insofar as providing for the purchase of textbooks with public funds for free loan to pupils attending religious schools and to restrain the Commissioner of Education from removing or attempting to remove any member of the plaintiff Board of Education for failure to comply with the said law and restraining the said commissioner from apportioning to any school district any public monies for the purpose of carrying out the law insofar as it may apply to pupils attending religious schools.

The commissioner in his answer denies the various allegations and in addition raises the defense of lack of standing by the plaintiffs to bring the action and that there is no justiciable controversy.

We are satisfied that the statute does not contravene the Constitution of the United States or that of the State of

New York but since we determine, as set forth hereinafter, that the plaintiffs have no standing or status to bring the present action, we do not base our decision upon the merits.

The defense of the lack of standing to raise the constitutional issue, set forth in the answer of the commissioner, concerns the identical issue recently considered by this court in *City of Buffalo* v. *St. Bd. of Equalization* (26 A. D. 2d 213, 215) and we find no compelling argument on the present record to distinguish a school board from a municipality. There is a consistent line of appellate court decisions to the effect that a public body—in the present instance the Board of Education—has no standing to challenge a State statute restricting its governmental powers (*County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Reg. Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487, app. dsmd. 351 U. S. 922, 76 S. Ct. 780).

The basic principle involved is that the municipality or other agency is the creation of the State, subject to its direction and control. The extent, nature and purpose of such governmental powers are within the absolute discretion of the State and any alteration, impairment and destruction of these powers by the Legislature present no question of constitutionality. School boards, such as the plaintiffs herein, are the creation of the State, dependent upon the State for existence and performing their function subject to the control and direction of the State under the aegis of the Education Department through its commissioner.

As we stated in *City of Buffalo* (*supra*, p. 215): "[I]f consideration should be given to relaxing the rule * * * it is not a decision to be made by an intermediate appellate court."

As the concurring opinion notes, there are decisions where a Board of Education sues the commissioner, but not under

the present circumstances, and the citations are not controlling. We would also note that an examination of the complaint does not substantiate the statement that the action can be interpreted to have been brought by the individual members of the respective boards. (See *St. Clair* v. *Yonkers Raceway,* 13 N. Y. 2d 72, 76.) As to procedural restrictions in reaching legal issues, see *Matter of Bd. of Educ.* v. *Nyquist* (23 A. D. 2d 592).

The judgment and order should be reversed, on the law, and the complaint dismissed.

Gibson, P. J., and Reynolds, J., concur. Staley, Jr., and Brink, JJ., concur in the result, in an opinion per Staley, Jr., J.

CONCURRING OPINION

STALEY, JR., J.

This is an appeal from an order and judgment of Special Term entered in Albany County August 30, 1966, which declared chapter 320 of the Laws of 1965 unconstitutional and in violation of both article XI, section 3 of the Constitution of the State of New York, and the First Amendment of the Constitution of the United States, insofar as it provides for the purchase of textbooks with public moneys for loan to students enrolled in grades seven through twelve in schools under the control or direction of a religious denomination, and which enjoined the defendant-appellant from removing from office any member of the plaintiff school board who failed to comply with the provisions of such law, and which enjoined the defendant-appellant from apportioning to any school district any public moneys for the purchase of textbooks for free loan to such students.

The plaintiff-respondent seeks a declaratory judgment determining that the Education Law, as amended by chapter 320 of the Laws of 1965, insofar as it provides for loan of secular textbooks to students attending schools, wholly or in part, under the control of a religious denomination is unconstitutional, and also for an injunction against the Commissioner of Education from removing members of the plaintiff school board from office for refusing to comply with the statute, and from appropriating money to school districts for the purpose of purchasing textbooks for such students.

The defendant-appellant is the Commissioner of Education of the State of New York, and the intervenor-defendant-appellants are parents of children residing in the school district attending Catholic parochial schools. Prior to the enactment of chapter 320, these parents purchased all of the textbooks used by their children, including textbooks of the type which they will be entitled to borrow pursuant to the said law. The appellants moved for dismissal of the complaint on the ground that it failed to state a cause of action, or for summary judgment declaring the statute constitutional, and the plaintiff cross-moved for judgment declaring the statute unconstitutional.

The constitutional and statutory provisions involved are the following:

"U. S. Const. Amend. I:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *'

U. S. Const. Amend. XIV:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.'

N. Y. Const. Art. XI, § 3:

'Neither the state nor any subdivision thereof shall use its property or credit or any public money, or otherwise authorize or permit either to be used, directly or indirectly in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught * * *.'

Education Law, § 701 (2), as amended by L. 1965, c. 320:

'In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities.'"

The first question presented is whether or not the plaintiff school board of education has the legal capacity to institute an action for declaratory judgment involving the constitutionality of a state statute.

Subdivision 3 of section 701 of the Education Law, as amended by chapter 320, provides:

> "* * * boards of education * * * shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in * * * a public or private school which complies with the compulsory Education Law, textbooks."

Each member of the plaintiff school board took an oath of office obligating himself to support the Constitution of the United States and the Constitution of the State of New York. Any school board member willfully disobeying any rule or regulation of the commissioner, may be removed from office by the commissioner after a hearing. (Education Law, §§ 306, 1706.) Furthermore, the commissioner may withhold from any district public moneys for willfully disobeying any provision of law or any decision, order or regulation of the commissioner. (Education Law, § 306.)

The Department of Education, on January 10, 1966 advised the District Superintendents of local school districts that, under the law:

> "* * * all boards of education * * * have the power and it shall be their duty to purchase and to loan textbooks upon individual request to all children residing in the district enrolled in grades seven through twelve of a public or non-public school * * *."

The very nature of the relief sought indicates that it was the intent of the plaintiff to bring this action, not only in the capacity of a school board, but in their individual capacities as board members, to protect their civil right as elected officials to continue in office. Every citizen has capacity to sue, as differentiated from a right to relief, unless they are under some disability, and this right exists

regardless of the title or status of the plaintiff. (*Lincoln Field, et al.* v. *Allen,* 9 A. D. 2d 551.) By reason of the direct personal interests of the individual members of the board whose right to hold office may be directly affected, we are of the opinion that the plaintiffs could bring this lawsuit against this defendant.

The right of a local board of education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of state statutes. (*Matter of Board of Education of Central School District No. 2* v. *Allen,* 14 A. D. 2d 429; *Matter of Bethlehem Union Free School* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Education of Union Free School District No. 3, Town of Oyster Bay* v. *Allen,* 6 A. D. 2d 316, affd. 6 N. Y. 2d 871.)

The appellants rely primarily on the cases of *Black River Regulating District* v. *Adirondack League* (307 N. Y. 475) and *City of Buffalo* v. *State Board of Equalization and Assessment* (26 A. D. 2d 213). In these cases, the issues involved a curtailment of the governmental powers of state agencies and, as such they were subject to the control or direction of the state, and the nature of their powers could be altered, impaired or destroyed by the state.

The *Black River* and *City of Buffalo* cases do not deal with the right of public officials to challenge the constitutionality of a statute requiring them to take affirmative nonministerial action which they regard as unconstitutional. The said cases, holding that a state agency cannot question the power of the State Legislature to reduce its governmental powers, deal with a wholly different problem.

In the *City of Buffalo* case, this court held that the Mayor of the City of Buffalo had no standing in his official capacity

to challenge a state statute relating to exemptions from local real estate tax assessments.

The court stated at page 214 as follows:

> "The present Mayor's duties remained substantially unaltered and in his brief the only allegation is that he has the duty to protect the interests of the residents of the City of Buffalo and that the action was brought as the result of a resolution passed by the Common Council of that city. There is no allegation in the complaint, or otherwise, that in his capacity of Mayor, or his rights thereunder, there has been any impairment or prejudice of the same."

The plaintiff here alleges that the members of the school board may be prejudiced by removal proceedings if they fail to administer a state statute which is alleged to be unconstitutional.

The capacity of a school board to sue the Commissioner of Education, having been established by the courts in numerous decisions, such right should be available to challenge by an action for declaratory judgment a statute which may or may not compel the plaintiff to violate the constitution.

The second question presented is whether or not the provisions of article XI, section 3, of the New York State Constitution is violated by the statutory provisions of chapter 320 of the Laws of 1965.

The statement of policy set forth in chapter 320 provides as follows:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This

calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other nonsectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (N. Y. Sess. Laws 1965, Ch. 320, § 1.)

The fundamental importance of textbooks in the educational process is clear. President Johnson in his Education Program Message of January 12, 1965, noted:

> "The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the hands of education—an obstacle that can and must be eliminated." (111 Cong. Rec. 499, 500.)

The prohibition contained in article XI, section 3, of the State Constitution relates to the use of public property or money "directly or indirectly in aid or maintenance • • • of any school or institution of learning, wholly or in part, under the control or direction of any religious denomination • • •."

Chapter 320 provides for educational aids to the child, rather than through a subsidy to the school, by a loan of textbooks, the property of the school district, only to school children and only upon their individual request. The textbooks available for loan are those "designated for use in any public, elementary, or secondary schools of the state or are approved by any board of education, trustees, or other school authorities."

By the enactment of chapter 320, the state has recognized the education explosion of the 1960s, and that a uniformly high standard of education is a public responsibility.

The development of educational aid programs by both the Federal and state governments has resulted in benefits to students of public and non-public schools for the purpose of raising educational standards in New York State.

The New York State Scholar Incentive Program and the New York State Regents Scholarship Program, N. Y. Education Law §§ 601, 601-a have provided large sums for students attending universities under religious auspices. Students in nonsecular schools receive benefits under the Federal school lunch program administered by the State, New York Education Law § 3713, and from availability of health and welfare services through public schools, New York Education Law § 912.

The basic purpose of chapter 320 is thus readily ascertainable as an aid to the school child rather than as an indirect aid to the school. The provisions of article XI, section 3, of the New York State Constitution prohibits the use of property or money directly or indirectly in aid of any religious school or institution. Chapter 320 provides that secular textbooks may be furnished to the school child and not to the school. The books are furnished only on request of the child. They receive the property of the

state or of the school district and are furnished on loan only. The availability of books to students at nonsecular schools is little different from the availability of books in a public library, which are loaned to individuals regardless of race, color or creed.

In the case of *Chance* v. *Mississippi State Textbook Rating and Purchasing Board* (190 Miss. 453, 200 So. 706), a similar textbook law was challenged as contravening the Mississippi constitutional prohibition of appropriated funds for the support of any sectarian school. The court held that the constitutional provision did not forbid acts calculated to serve the educational needs of the child rather than to aid the school and stated as follows:

> "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."

We are of the opinion that the intent and purpose of chapter 320 was to provide additional educational aid to all school children attending the grades from seven through twelve, and that the statute did not aid directly or indirectly the school attended by said child. The statute, having been

enacted in the furtherance of a sound public policy to provide "more adequate educational opportunities" for school children, in the absence of any clear, unambiguous language forbidding such specific educational aid, it must be held non-violative of the state constitution.

A statute similar to the one here in issue was held valid by the Supreme Court of the United States, in the case of *Cochran* v. *Board of Education* (281 U. S. 370). The *Cochran* case involved a Louisiana statute under which school books were to be supplied to all school children of the state. The Louisiana Supreme Court held that the statute did not violate the section of that state's constitution prohibiting state aid to churches, sects or religious denominations. Chief Justice Hughes, in his opinion, affirming the holding of the Louisiana Supreme Court, quoted a portion of that court's opinion as follows:

> "The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children of the state alone are beneficiaries."

The respondents and the court below rely mainly on the cases of *Smith* v. *Donohue* (202 App. Div. 656) and *Judd* v. *Board of Education* (278 N. Y. 200) to support their conten-

tion that chapter 320 violates the state constitution. In both cases, it was held that the statutes involved violated the provisions of article XI, section 3, of the state constitution, to the extent that they provided aid to children attending non-public schools.

The *Smith* case concerned a statute which provided for the supply of free textbooks to children in public schools. In addition, the statute provided that the textbooks were to be supplied to the schools directly instead of to students upon individual application by the student.

In the *Judd* case, a statute providing for public transportation of students to parochial schools, was declared to be unconstitutional by a four to three vote. Soon after the Court of Appeals' decision, a constitutional amendment which approved such bus transportation was adopted. (Article XI, section 3, approved by the People November 8, 1938.)

The dissenting opinion in the *Judd* case stated as follows at page 220:

> "The statute is not designed to aid or maintain the institutions themselves * * *. The statute in question does not have the effect of giving public money, property, or credit in aid or maintenance of religious schools. The aid is given to the pupils who are legally attending such schools, to assist them to spend the required time in attendance upon instruction."

The development and acceptance of the "child-benefit principle" by the courts demonstrates that constitutional prohibitions against aid to parochial schools are properly interpreted to prevent programs designed to foster paro-

chial education as such, but not to prevent programs designed to improve the secular education of all children even though some students, thus aided, may attend religiously affiliated schools.

The third question is whether or not chapter 320 violates the No Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution of the United States. The original purpose of the No Establishment Clause was to protect religious liberty, and to preclude any governmental preference to any particular sect. The state statute here involved, provides for loans of textbooks for children in order to benefit the general welfare by extending their non-sectarian knowledge essential to their future development as citizens with no sectarian purpose.

In the case of *Everson* v. *Board of Education* (330 U. S. 1), a New Jersey statute was upheld as constitutional, which provided for payments to parents of parochial school children in reimbursement for the cost of transporting their children to parochial schools. Similar to the *Cochran* case (*supra*), the pupil-benefit principle was applied. The court, holding that the establishment clause cannot be applied to deny the benefit of a public welfare program to individuals because of religion, stated as follows:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *be-*

cause of their faith or lack of it, from receiving the benefits of public welfare legislation.".

In the case of the *Matter of Zorach* v. *Clauson* (303 N. Y. 161, affd. 343 U. S. 306), a state statute which provided for absence from public schools by students for religious observance and education was held constitutional.

The court stated at page 171 as follows:

> "The Supreme Court has recognized, in a religious freedom case, that to 'make accommodation between these freedoms' guaranteed by the First Amendment and 'an exercise of state authority' is always 'delicate' (*Prince* v. *Massachusetts,* 321 U. S. 158). Such freedoms are not absolute (*Dennis* v. *United States,* 341 U. S. 494; *Breard* v. *Alexandria,* 341 U. S. 622; *Schenck* v. *United States,* 249 U. S. 47). Numerous situations involving some incidental benefit to religion have been found constitutionally unexceptionable (*Everson* v. *Board of Educ.,* 330 U. S. 1; *Cochran* v. *Louisiana State Bd. of Educ.,* 281 U. S. 370; *Bradfield* v. *Roberts,* 175 U. S. 291). Tax exemption of church properties (Tax Law, § 4, subd. 6) is but another of many illustrations, and the practice is generally followed. * * * It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced."

See also, *64th Street Residences* v. *City of New York* (4 N. Y. 2d 268); *Baer* v. *Kolmorgen* (14 Misc. 2d 1015); *Scales* v. *Board of Education* (41 Misc. 2d 391).

Chapter 320 does not involve affirmation by the state of religious beliefs nor religious activities with the public schools. The statute is completely neutral with respect to

religion, since it merely makes available secular textbooks to requesting students, regardless of the schools they attend. It completely meets the test for constitutionality under the First Amendment as stated by United States Supreme Court in *Abington School District* v. *Schempp* (374 U. S. 203, 222):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution * * * there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Chapter 320 of the Laws of 1965 does not violate either the provisions of the Federal or State Constitution, and is constitutional in all respects.

The judgment and order should, therefore, be reversed, on the law, and the complaint dismissed.

COURT OF APPEALS

Remittitur

June 1, 1967

BE IT REMEMBERED, That on the 1st day of February in the year of our Lord one thousand nine hundred and sixty-seven, Board of Education of Central School District No. 1, Towns of East Greenbush, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Marvin E. Pollock, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James E. Allen, Jr., as Commissioner of Education of the State of New York, the respondent, and Michael Rock, & ors., the intervenors-respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, and James J. MacKrell, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Marvin E. Pollock, of counsel for the appellants, and by Jean M. Coon, of counsel for the respondent, and by Mr. Porter R. Chandler, of counsel for the intervenors-respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Opinions of Court of Appeals

Majority Opinion

Scileppi, J. Section 1 of chapter 320 of the Laws of 1965 provides in part: "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state." (L. 1965, ch. 320, § 1.)

In keeping with this declaration of policy, the Legislature enacted subdivision 2 (renum. subd. 3 by L. 1966, ch. 795) of section 701 of the Education Law permitting the appropriate school authorities "to purchase and to loan upon individual request, to all children * * * who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

Plaintiffs seek judgment that this statute violates both the State and Federal Constitutions (N. Y. Const., art. XI, § 3; U. S. Const., 1st and 14th Amdts.). The defendant Commissioner of Education and the intervenors-defendants, parents of children residing in plaintiffs' school district

who attend parochial schools, moved for dismissal of the complaint for failure to state a cause of action or for summary judgment declaring the statute constitutional. The plaintiff Boards of Education cross-moved for summary judgment declaring the statute unconstitutional.

Special Term denied all defendants' motions and granted plaintiffs' cross motion, holding that the plaintiffs had standing to sue; that the statute contravenes section 3 of article XI of the State Constitution (the "Blaine Amendment"); and that the statute violates the establishment and free exercise clauses of the First Amendment.

The Appellate Division reversed upon the ground that the plaintiffs had no standing.

Since we must reach the merits in this case,[1] we come to the question whether this statute violates section 3 of article XI of the New York State Constitution: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]).

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[1] The writer and Judges BURKE and BERGAN agree with the Appellate Division majority that plaintiffs have no standing. Judge KEATING, who is for affirmance on the merits, agrees with the dissenters that plaintiffs do have standing.

In *Judd*, this court by a vote of four to three declared that a law which provided for school busing of parochial school children could not be sustained because it constituted indirect aid to schools which was in violation of the Blaine Amendment. *Judd* determined that, although school busing was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to sectarian schools and thus ran afoul of section 3 of article XI prohibiting indirect aid. It is now argued that the statute before the court providing for textbooks loans to all children, including those attending parochial schools, must be unconstitutional for the same reason. We cannot agree with the reasoning of the majority in the *Judd* case and accordingly hold that it should not be followed. The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them". (*Matter of Zorach* v. *Clausen*, 303 N. Y. 161, 172, affd. 343 U. S. 306.) The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as such.

The purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1, *supra*), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern.

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.

Only textbooks designated for use by the public schools or approved by Boards of Education, trustees or school authorities may be lent (Education Law, § 701, subd. 3). The State and local governments have long provided public libraries with books for use by all persons. It is not uncommon for schools, public and private alike, to assign various "outside readings" to pupils. Children often, then, fulfill assignments for courses in both public and private schools by means of using and borrowing from public libraries. We do not consider this indirect aid to private or parochial schools.

At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an

educational lag between children in public and private schools. We cannot perpetuate an erroneous interpretation of the State Constitution merely because it is contained in the reports of this court.

Having decided that section 701 entails no aid to the parochial schools, we thus hold that there is no Federal constitutional question under the establishment clause of the First Amendment. The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning non-religious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18).[2]

As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen

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[2] Mr. Justice JACKSON, who dissented in *Everson*, objected to the statute there under consideration because it limited payments to the parents of public school or of *Catholic* school children. He said: "A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld." (330 U. S., *supra*, p. 25.) Subdivision 3 of section 701 of the Education Law asks no questions about what school the child attends, thus avoiding even the objection raised by Mr. Justice JACKSON in his *Everson* dissent.

the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments.

The order appealed from should be affirmed, without costs.

Dissenting Opinion

Van Voorhis, J. (dissenting). Plaintiff Boards of Education have, as it seems to us, capacity to sue. The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo* v. *State Bd. of Equalization*, 26 A D 2d 213; *County of Albany* v. *Hooker*, 204 N. Y. 1, 9-10; *Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475, 487; *St. Clair* v. *Yonkers Raceway*, 13 N Y 2d 72, 76). The reasons for this conclusion are adequately stated in the opinion by Special Term and in the concurring opinion at the Appellate Division. These Boards of Education are not seeking to augment their powers by obtaining an adjudication that a statute is unconstitutional which purports to restrict their authority, but, instead, they are asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by this statute. If subdivision 3 of section 701 of the Education Law (as amd. by L. 1965, ch. 320, and L. 1966, ch. 795) is unconstitutional insofar as it authorizes the purchase of textbooks by school boards for loan to children enrolled in parochial schools, then the school boards would exceed their powers in making such expenditures. Upon the other hand, if that statute

is valid, as the State Commissioner of Education has ruled, any disobedient school board member becomes liable to removal from office (Education Law, §§ 306, 1706) and the Commissioner may withhold public moneys from any district whose school board disobeys the Commissioner's directive implementing the statute.

The right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. (*Matter of Board of Educ. of Cent. School Dist. No. 2* v. *Allen,* 14 A D 2d 429; *Matter of Bethlehem Union Free School Dist.* v. *Wilson,* 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen,* 6 A D 2d 316, affd. 6 N Y 2d 871.)

This brings us to the question whether this statute violates section 3 of article XI of the New York State Constitution, which reads as follows: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

The last portion of this section, relating to the transportation of children, was added by special amendment to obviate the immediate impact of the decision in *Judd* v. *Board of Educ.* (278 N. Y. 200 [1938]). The *Judd* case held that this provision of the State Constitution was violated by the then section 206 of the Education Law insofar as it purported to authorize the use of public funds to pay

for the transportation of pupils to or from schools wholly or in part under the control or direction of religious denominations or in which religious doctrines or tenets were taught. The providing of schoolbooks for such schools touches more nearly what section 3 of article XI of the Constitution was designed to prohibit than the transportation of pupils by bus. The origin and purpose of this constitutional provision are discussed so thoroughly in the opinion of the court by Judge RIPPEY that we shall not repeat here what was said. It is argued here that in the *Judd* case, the expenditures were to be for the benefit of the parochial schools, whereas under this statute, they are for the pupil under the so-called child benefit theory. The court in the *Judd* case, however, cites and follows *Smith* v. *Donahue* (202 App. Div. 656) which held to be unconstitutional a construction of subdivision 4 of the then section 868 of the Education Law which would authorize Boards of Education to furnish free textbooks and other supplies to the children attending parochial schools. The Appellate Division, Third Department, there said (p. 664): "It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning. It seems very plain that such furnishing is at least indirectly in aid of the institution and that, if not in actual violation of the words, it is in violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional. (*People ex rel. Bolton* v. *Albertson*, 55 N. Y. 50; *Matter of Hopper* v. *Britt*, 203 id. 144.)" The *Smith* case was, as above stated, cited with approval and followed in *Judd*.

Unless *Judd* and *Smith* be overruled, they are decisive of the present issue. It does not seem to us that any basic change has been wrought by the passage of time in the factors considered in *Judd* and *Smith*. The subject is controversial, and has been controversial in this country for over 200 years. It is unlikely that new developments have materially altered the basic considerations.

If this provision in the State Constitution were to be equated in these respects with the First Amendment to the Federal Constitution, it is by no means clear that the result would be different. It is true, to be sure, as stated by Justice JACKSON in *McCollum* v. *Board of Educ.* (333 U. S. 203, 238), that there are times when "the legal 'wall of separation between church and state' [becomes] as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." Nevertheless, the tendency of the Supreme Court has been rather strict in maintaining this wall of separation for reasons eloquently stated many years ago by Madison and Jefferson (*Engel* v. *Vitale*, 370 U. S. 421; *Abington School Dist.* v. *Schempp*, 374 U. S. 203; *McCollum* v. *Board of Educ.*, 333 U. S. 203, *supra*). *Everson* v. *Board of Educ.* (330 U. S. 1, permitting payments for bus transportation) might have been decided differently today, inasmuch as it was decided five to four with Justice DOUGLAS in the majority. He later wrote in *Engel* v. *Vitale* (370 U. S. 421), at page 443, that "The *Everson* case seems in retrospect to be out of line with the First Amendment * * * Mr. Justice RUTLEDGE stated in dissent what I think is durable First Amendment philosophy".

These and other decisions by the Supreme Court seem to have outdistanced *Cochran* v. *Board of Educ.* (281 U. S. 370). The Supreme Court therein was not bound by the

First Amendment, which had not then been mandated on the States by the Fourteenth Amendment to the Federal Constitution, and the Louisiana court had held that there was no violation of the Louisiana Constitution (*Borden* v. *Louisiana State Bd. of Educ.*, 168 La. 1005). The furnishing of textbooks to the students of parochial schools was there sought to be restrained under the Fourteenth Amendment alone, as taking private property for a private purpose. The argument there prevailed that public aid was for the purchase of schoolbooks for the use of children rather than being for the school itself. This "student benefit theory" is hardly new, as respondents-intervenors assert that it is. It was overruled in this State in *Smith* v. *Donahue* (*supra*) and this court stated in the *Judd* case that the constitutionality of the Louisiana statute authorizing the appropriation of public funds for textbooks was decided under the Louisiana Constitution and "was not a Federal question" (278 N. Y., *supra*, pp. 213-214). Our opinion in *Judd* continued by stating: "The reasoning followed in the Louisiana State courts has been followed in no other case to which our attention has been called, but has been expressly disapproved in *State ex rel. Traub* v. *Brown, supra* [36 Del. 181, 187, writ of error dsmd. Feb. 15, 1938]."

This 1894 amendment (N. Y. Const., art. XI, § 3) has its roots in the early history of the State and belongs to "the long and intensive struggle for religious freedom in America", which Justice RUTLEDGE mentioned in his dissenting opinion in *Everson* v. *Board of Educ.* (330 U. S. 1, 33-34, *supra*) of which he said the First Amendment "was the direct culmination." Despite differences in phraseology, the object of both the First Amendment and this State amend-

ment is to keep religion from being dominated by government and to prevent government from being dominated by pressure groups seeking to control it for the promotion of religion.

If the books to be purchased by Boards of Education and supplied to pupils of parochial schools were religious tracts, it is conceded that the statute would be unconstitutional. The mere circumstance that they would be loaned to the pupil rather than supplied directly to the school would not preserve its validity. The constitutionality of this enactment is sought to be sustained on the basis that the textbooks to be supplied are "secular" rather than "religious". Counsel for respondents assume that the clause in the section which states that they "shall be textbooks which are designated in any public, elementary or secondary schools in the state or are approved by any boards of education, trustees or other school authorities" means that the same books that are furnished to children attending public schools shall be furnished children attending private schools. The language does not exactly say this but, even if it were so construed, that would not sustain its constitutionality. The difficulty is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other. In his concurring opinion in *McCollum* v. *Board of Educ.* (333 U. S. 203, 235, *supra*) Justice JACKSON observed that: "Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized", but he continued by pointing out (p. 236) that it is necessary even in "preparation for a worldly life to know the roles that religion and religions have played" in the story of mankind, and that it is impossible to teach music, architecture, painting, history or literature without verging upon the religious field. One of

the most important reasons on account of which church communicants have chosen, with much financial sacrifice, to have their children taught in parochial schools, is that the have wanted them to be indoctrinated on these subjects with the church point of view. It would be too much to expect that were the church in control of public school instruction, textbooks would not be selected which present church interpretation of such historical, scientific or philosophic items, for example, as the Council of Trent, the Reformation, the Spanish Inquisition, the Encyclopedists, Astronomy (cf. Copernicus and Galileo), Evolution, Social Studies (e.g., birth control, divorce, abortion) or, to quote again from Justice JACKSON in *McCollum* (*supra*, p. 236), "even the New England effort to found 'a Church without a Bishop and a State without a King' * * *". The New Englanders succeeded, for a while, in creating one of the most absolute theocracies of all time. No doubt Jefferson and Madison had this in mind when they fashioned the First Amendment, as well as the grounds for rebellion of "Recusants" and "Dissenters" against the Church of England. "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry." (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 236, JACKSON, J., concurring.)

This has the most direct bearing upon the point presently at issue. If it were not true, church members who are compelled by law to pay taxes for public schools would not feel constrained by conscience and discipline to support religious schools for their own children. If the state is to provide

schoolbooks for instruction in "secular" fields, which have inseparable religious connotations, and parochial schools become increasingly dependent upon the state money to provide textbooks, which are the life blood of education, this statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent, and at certain times and places, irresistible, and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church.

As in the case of a trustee (e.g., *Matter of Hubbell*, 302 N. Y. 246, 259), the motivation of a religious group may be of the best, and its sense of mission the most disinterested, and yet—unless we are to change our governmental philosophy—the fundamental law will not permit it to be placed in a position where its own interest depends upon eroding the principle of separation between church and state.

The tendency on the part of the state to dominate the church has been observed in every totalitarian country, and it is actually what the First Amendment and article XI (§ 3) of the State Constitution were designed to prevent. The writings of James Madison, in particular, indicate that his concern for the separation between church and state was that he believed it to be as much in the interest of religion as of government.

If there were some applicable standard by which secular and religious textbooks could be distinguished from each other, there would remain the question whether taxpayers' money would be spent to buy necessaries for parochial schools, thus liberating funds to be spent upon more strictly religious objectives. We are not required now to determine the constitutionality of expenditures for school lunch

programs, health and welfare services, busing, or even scholarships in the case of higher education. Our present concern is solely with textbooks for children, which are at the heart of the educational process.

The order appealed from should be reversed and the order and judgment of the Supreme Court, Albany County, be reinstated.

Judges BURKE, BERGAN and KEATING concur with Judge SCILEPPI; Judge VAN VOORHIS dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BREITEL concur.

Orde affirmed.

SUPREME COURT

ALBANY COUNTY

Judgment on Remittitur

June 15, 1967

The above named appellants, the Boards of Education of the East Greenbush and Roslyn School Districts, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of that Court on the 6th day of January, 1967, reversing an order and judgment of Supreme Court, Albany County, entered in the office of the Albany County Clerk on the 30th day of August, 1966, holding Chapter 320 of the Laws of 1966, to be unconstitutional and void insofar as it provides for the purchase and loan of text books to pupils attending religious schools, said order of reversal having held that the plaintiffs had no standing to contest the constitutionality of an act of the State Legislature, and said appeal having been argued at a term of the Court of Appeals of the State of New York, commencing on February 14, 1967, by Marvin E. Pollock, Esq., of counsel for plaintiffs-appellants, and by Mrs. Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant-respondent, and by Porter Chandler, Esq., of counsel for James J. MacKrell, Esq., attorney for intervenor-defendants-respondents, and briefs of amici curiae having been submitted, and after due deliberation, the said Court of Appeals, having handed down its decision, on June 1, 1967, affirming the order of the Appellate Division, three judges

dissenting, holding Chapter 320 of the Laws of 1966 constitutional in all respects, without costs,

And the original record and remittitur of the Court of Appeals having been filed in the Albany County Clerk's office, it is

ORDERED AND ADJUDGED that the order and judgment of Supreme Court, Albany County, entered August 30, 1966, be and the same hereby is reversed.

JOHN S. BARTLETT
Albany County Clerk